United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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FOR THE SECOND CIRCUIT

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act made by

EDWARD POTENZA,

Claimant-Appellee,

—against—

UNITED TERMINALS, INC.,

Employer, Appellant,

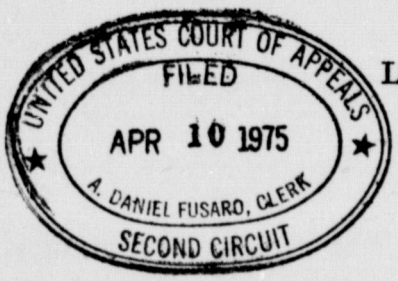
—and—

FEDERAL INSURANCE COMPANY,

Carrier, Appellant.

On Review Of The Decision Of The Benefits Review Board Of The United States Department Of Labor

APPELLANTS' BRIEF



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APPELLANTS' BRIEF

(References in parenthesis herein bearing subscript (a) designate pages of Appellants' Appendix herein.)

Statement

Appellants appeal from a decision of the Benefits Review Board of the United States Department of Labor (14a-17a-1) wherein the Benefits Review Board affirmed a previous decision of an Administrative Law Judge of the United States Department of Labor (6a-13a) which held the employer and carrier responsible for an aggravation of a pre-existing cancer of the jaw as a result of an accident of October 2, 1972 (8a) and which made an award to the appellee for disability and facial disfigurement, directed that the appellee was to be reimbursed for medical expenses and hospital bills rendered in connection with the cancer, and awarded a legal fee to appellee's then attorney against appellants (12a, 13a).

The Issues

1. Appellants contend that there is no substantial evidence to sustain the rulings and order of the Administrative Law Judge, as affirmed by the Benefits Review Board, that claimant's accident of October 2, 1972 aggravated a pre-existing ameloblastoma; that there is no relationship either on the basis of causation or aggravation between the accident and said cancerous condition.

2. Awards made to the claimant for surgical procedures rendered in connection with the ameloblastoma, disability following such surgical procedures, and award for facial disfigurement based on findings of compensability, as well as the order to reimburse the claimant for reasonable medical, dental, surgical, and hospital bills, rendered in connection therewith, should therefore be vacated and held not to be the responsibility of the employer and carrier, appellants herein.

3. *Arguendo,* even assuming that the decisions and orders below are supported by substantial evidence, that as a matter of law employer and carrier are not responsible for the $800.00 directed to be paid claimant's attorney by appellants herein as value of professional services rendered by said attorney including fee to Dr. Albanese for testifying.

4. That the sole liability of appellants as a result of the accident of October 2, 1972 should be for the period of disability from October 2, 1972 through October 15, 1972, inclusive, for which appellants have made payment of compensation to the claimant-appellee at the maximum $70.00 rate prior to the bringing of formal proceedings before the Administrative Law Judge, and that liability of appellants be limited to that amount and the case should be closed on payments so previously made by appellants.

Note in Respect of Appearances and Representation

In proceedings before the Deputy Commissioner and the Administrativce Law Judge below, Claimant-Appellee was represented by Leon Blaufarb of the firm of Kalmanson, Klapper & Blaufarb, Esqs., 225 Broadway, New York, N.Y. 10007 (20a).

These attorneys withdrew from further representation of Appellee and did not participate in proceedings before the Benefits Review Board below. Appellee was not represented by counsel before the Benefits Review Board.

William J. Kilberg, Esq., Solicitor of Labor, filed a brief before the Benefits Review Board as attorneys for the Director of Workers' Compensation Programs and contended that the award and order of the Administrative Law Judge should be affirmed.

Appellee has not retained counsel to represent him on the instant appeal.

Appellants' Appendix on this appeal was submitted to the Benefits Review Board, William J. Kilberg and Claimant-Appellee in proof form prior to actual printing thereof. No changes or additions having been requested the proof was printed in final form unchanged and is submitted herewith.

Facts

On October 2, 1972, while working on a ship, claimant sustained an accidental injury arising out of and in the course of his employment as a longshoreman by United Terminals, when struck by a box of bananas on the left side of his face and shoulder (21a, 29a).

The episode occurred at about 10:30 in the morning and claimant continued to work right up to lunchtime (29a, 30a, 32a).

Claimant testified that he felt no pain in the left side of his face, his shoulder hurt "just a little", and he felt as though his bridge work had broken (31a).

At the time of the occurrence he took the bridge out of his mouth, found nothing wrong with it, kept on working, and when he looked at his handkerchief at the time of removing the bridge from his mouth he noticed something like a little mucous on the handkerchief, yellowish pink in color (31a, 32a).

At lunch when he tried to bite into a ham and cheese sandwich he said he felt pain in his jaw and he went to the timekeeper who sent him to Columbus Hospital. After x-rays they gave him an appointment to see Dr. Albanese ten days later. However, his jaw was bothering him and he went to see Dr. Tagliagambe the following day (32a).

He then went to the ILA Clinic and they did x-rays and they sent him back to Columbus Hospital who immediately referred him back to Dr. Albanese (32a).

Dr. Tagliagambe examined the claimant on October 3, at the dispensary on the pier where the accident took place (130a, 131a). He found that claimant had sustained a contusion of the left side of the jaw and a contusion and abrasion of the left shoulder region (131a). On examining the side of claimant's mouth he saw an opening about the size of a pin head in the left side of the jaw through the mucous membrane at that point, there was no evidence of laceration, contusions, cuts, or bleeding, within the mouth except for that one small perforation (115a).

Dr. Albanese, a dental surgeon, to whom claimant was referred by the Columbus Hospital, first saw the claimant in his office on October 5, 1972 (50a, 52a).

He saw a discontinuity or interruption of the mucosa of the gum from which brownish fluid emerged (53a). He telephoned Columbus Hospital and was advised that the x-ray taken the day after the accident showed a large lesion in the left mandible, the bone of practically the whole left jaw was completely destroyed with only about a sixtenth of an inch of the lower portion still intact (54a, 55a).

Dr. Albanese performed an operative procedure in his office consisting of a biopsy and removing the entire soft tissue or cystic lining of the tumor although he didn't know it was a tumor at the time and sent it to his consulting pathologist Dr. Harry L. Robinson (56a). Dr. Robinson reported to Dr. Albanese that the pathology in claimant's left jaw was a neoplasm, an acanthomatous ameloblastoma (36a).

As a result of the diagnosis he scheduled surgery for excision of the cancer on November 15, 1972 (63a).

At the time of the major surgery on November 15, he removed the entire area of the cancerous mandible including two centimeters on either side of the diseased bone, in order to make sure that the entire tumor would be removed (64a). He replaced the surgically removed diseased bone with a bone graft obtained from claimant's right hip, inserted it into the surgical gap and supported it with a titanium prosthesis to hold the graft in place (64a, 65a).

The surgery appears to have been successful (66a).

Some time after the original procedure Dr. Albanese performed on October 5, 1972 he communicated with the carrier, Federal Insurance Company, to advise that he was scheduling the major surgery on November 15, 1972 but the carrier would not authorize that surgery. The doctor nevertheless proceeded because he felt the surgery was indicated (62a).

Claimant was out of work as a result of the major surgical procedure for 57 days (45a). As a result of the November 15, operation to remove the tumor there is a scar of the operative procedure under the left mandible extending back toward the ear lobe which does constitute a serious facial disfigurement (205a).

POINT I

Substantial evidence is required to support a finding of fact. There is no substantial evidence to support the finding that the October 2, 1972 injury aggravated the pre-existing ameloblastoma.

Findings of fact must be supported by substantial evidence in the record considered as a whole (33 USCA §21 (b)(3)).

The Administrative Law Judge found that the accident of October 2, 1972 aggravated the previously asymptomatic ameloblastoma thereby entitling claimant to receive compensation benefits under the Act (Item 9 ALJ Decision April 5, 1974) (8a). It is conceded by appellee, and so found below, that the cancer pre-existed and was not caused by the accident of October 2, 1972 (8a, 15a, 201a).

An examination of the cases cited in the Administrative Law Judge's decision instead of supporting its conclusion demonstrates that the evidence in this record does not support the finding of aggravation. The Benefits Review Board decision specifically characterized that the testimony relied on by the Administrative Law Judge was admittedly speculative (16a).

The Administrative Law Judge's decision correctly noted that to establish compensability it is not necessary to establish that a trauma caused the cancer but that compensability is sufficiently supported if aggravation results (Item 11 ALJ Decision April 5, 1974) (9a). It further correctly states that there are many cases in which Courts on trials of fact have reached an affirmative conclusion despite strong medical evidence to the contrary (Item 10 ALJ Decision April 5, 1974) (9a).

Under Item 11 (9a) the ALJ decision, referring to *Larsen,* states that "aggravating" a disease in cancer cases occurs where the growth is ruptured or spread by occupational exertions, or development hastened by occurrences in the course of the employment. The decision then says, incorrectly we submit, that the cases for the most part are quite similar to each other. In the next Item, 12 (10a), the decision correctly observes that "Doctors on each side venture opinions, and decisions for claimants are based of course, not on certainty, but on a reasonable degree of probability".

The decision in Item 13 goes on to discuss a number of citations (10a, 11a). We submit that review of the decisions cited in Item 13 show factual situations entirely dissimilar from the facts in the instant claim.

In the instant claim, as will be discussed hereafter, the injury was trivial. The striking of claimant's face by the falling box caused no signs of a severe trauma, or even a moderately severe trauma. In this factor therefore the instant case is quite different from every one of the cases cited in Item 13 (10a, 11a).

Considering each of the cited cases in the same order in which they appear in Item 13 it is apparent that the cases so discussed have no bearing whatsoever on the issues presented in the instant case.

In *Travelers Insurance Company* v. *Rowand,* 197 F 2d 283, the claimant, an electrician, was thrown against a live electric wire containing 6,900 to 11,000 volts when his safety buckle released. This caused burns of his arms, legs, feet, back and forehead, he was rendered unconscious and thrown astraddle of an iron pole causing injuries to the right side of his testicles, scrotum and inguinal area, and lower abdomen. Within two to three days the testicle became swollen and bluish and so painful that he had to use a pillow between his legs to support that portion of his body in trying to sleep. He went back to work after the swelling reduced somewhat but the condition gradually became worse and finally he was operated on for malignant teratoma of the right testicle, further surgery was required and led up to total disability. The nature of the accident and the injuries suffered were obviously severe, direct to the area where the cancer was found and although the physicians who testified could not state specifically that the cancer was caused by the accident they could and did state that the accident aggravated it. There was contrary evidence but the testi-

mony of the physicians and the facts that they brought forward in support of their conclusion amply supported a conclusion of relationship.

In *De Angelo* v. *American Can Company,* 11 A.D. 2d 283, claimant received a severe blow to the lower portion of his thigh and the decision cites that claimant testified that he was really hit hard at that point. Within ten days the left thigh became painful and swollen and an area of hardness appeared at that point. Within thirteen days a physician described a large hard mass four and a half by six inches in size at the point where the injury occurred. Pathological study showed that the mass was a rhabdomyosarcoma, a highly malignant tumor. The decision disclosed that one physician who testified said that the cancer was "delicate, highly vulnerable to any type of exterior influence and particularly vulnerable to trauma." Another specialist testified that this particular cancer was "one of the few tumors" which may be "particularly aggravated by all forms of trauma". There was strong opposing medical opinion also but on the basis of the foregoing the Court stated that a finding of aggravation was sufficiently supported on the basis of the proof elicited.

In *Lumbermans Mutual Casualty Co.* v. *Reed,* 66 S E 2d 360, the accident occurred when claimant driving a truck hit a telephone pole. The claimant continued to work for eight days and on the twelfth day after the accident was admitted to the hospital and was operated on. The employer received a telephone call from the wife reporting that claimant had sustained two fractured ribs and a ruptured liver and it was a serious condition. The operation showed that the deceased's liver was in an advanced stage of cancer and the deceased died right after the operation.

There was contradictory testimony according to the decision which did not discuss the evidence in detail, but indicated that the blow brought tension to the mass and caused a more rapid spread of cancer cells thereby hastening the death. Another physician said that if there had not been any accident the deceased might have lived a month or two longer. Upon the foregoing the Court found there was sufficient to establish compensability.

In *Marsigli's Estate* v. *Granite City Auto Sales, Inc.*, 197 A. 2d 799 (incorrectly cited at page four of the decision as 709) the deceased, apparently previously in good health, fell on ice immediately experiencing severe pain in the right hip, which pain continued and never ceased to the date of death. As the pain became worse he developed a burning sensation on frequent nocturnal urination during the three to four weeks subsequent to the fall. There was some indication that there might have been some preceding pain. However, the symptoms and illness of increasing severity continued to death. The decision describes that several witnesses testified that the fall aggravated the carcinoma and shortened the deceased's life expectancy than would have occurred had the malignancy not been affected by the fall.

In *Tiller* v. *Southern U.S.F. Inc.*, 246 So. 2d 530, interestingly enough involving a cancer of the jaw, although the type of cancer is different from the one in the instant case, claimant was struck on the left jaw on September 6, 1968. The accident caused a severe contusion, bruise, or hematoma with swelling and a burning sensation at the point of impact. A lump or knot arose at the point of impact. The condition grew from bad to worse and the bump or knot grew to the size of a golf ball. The condition of his jaw continued to deteriorate and it later developed that the claimant's jaw developed a moth eaten appearance. X-rays were described as showing a fracture

at the point of impact. The decision stated that the overwhelming weight of the medical evidence left no room to doubt that the trauma of the jaw aggravated the malignant condition. The Court commented that there was little evidence to the contrary. Claimant did not receive proper treatment for months after the episode. The Court further stated that testimony reflected that the claimant would have had a better chance of recovery if the tumor had been discovered at an earlier age. In viewing the record the Court specifically stated "the substantial evidence rule to support the finding of the Workmen's Compensation Commission does not mean a small part of the total evidence nor does the rule prevent the Appellate Court from examining the whole evidence to the end that the Act may be applied in a just and reasonable manner". (Supra page 532, 533).

In *Old* v. *Cooney Detective Co.*, 138 A. 2d 889, the claimant fell six feet onto a stone floor sustaining severe injuries to his face, fracture of the right zygoma and malar bone, extending into the antrum with bleeding into the antrum. The teeth had to be removed. The claimant's condition steadily declined and markedly so. He previously had had chronic hypertension and four months later suffered a stroke resulting in a right sided paralysis. Within a year he was declared to be permanently totally disabled 70% of which was related to the accident and 30% of which pre-existed. However, his condition steadily declined and he died approximately two years later of cancer of the bladder with generalized metastases. The Court on reviewing the specific facts of that case found sufficient there in the expression of opinion of the physicians supported by their reference to the facts, to warrant the conclusion that there was a relationship.

However, in the *Old* case the Court stated at page 896 "possibility that the injury caused the result must amount

to more than a guess and the relation of the accident to the condition complained of in point of view of time and circumstances must not be merely fanciful. * * * "The law requires proof of probable, not merely possible facts including causal relationship". The *Old* case then cites the matter of *Reeves Motor* v. *Reeves,* 105 A. 2d 236, 239.

The *Reeves* case is not cited in the ALJ Decision from which appeal is herein taken. In the *Reeves* case however the Court reversed a finding of compensability after delivering the above quotation on the basis that the testimony of the witnesses although ostensibly stating there was a relationship did not show sufficient basis for the conclusion to support finding of compensability and that case was disallowed.

The *DeAngelo* case, supra, cited *Matter of Shaffer* v. *S. Klein,* 6 A.D. 2d 924. They state the case involved a direct trauma to a breast. An award was made on the basis of aggravation. The Court in reviewing the evidence described that the employer's expert testified that trauma might under certain circumstances cause the enlargement of a tumor. The decision further reflects that the pathologist called by the employer stated that although the tumor itself took months to develop cells found in his pathological examination in the axilla were recent and could have originated between the time of the accident and the time of operation seventeen days later. The decision further describes that the pathologist had not known of the history of trauma and when provided with it said that he would go along with an opinion of precipitation and specifically testified that he found evidence of trauma within the tumor.

Reference in the foregoing is also made to *Matter of Kornblum* v. *S & S Produce,* 4 A.D. 2d 719. That claim involved an accident when the claimant struck his head against a door jamb and became momentarily stunned.

Thereafter he experienced complaints of headaches, dizziness and loss of equilibrium and approximately six weeks later he was operated on and a tumor excised from his brain. The tumor was found to be a metastatic cancer of the brain. Approximately a month later the deceased died and autopsy revealed that the brain tumor was a metastasis from a bronchogenic carcinoma which actually caused death. The decision describes that a number of medical experts including the operating surgeon denied causal relationship. A doctor on behalf of the claimant said that the accident aggravated the brain tumor possibly by causing excessive bleeding. The Court reported that there was no evidence of such bleeding. They concluded that they must regard as unsubstantial his testimony as to aggravation. In describing the evaluation of medical testimony the Court commented that where a doctor makes a statement of aggravation with little or no amplification or explanation that the categorical statement is not enough to support relationship where the evidence in the record is primarily to the contrary. They reversed the finding of compensability and disallowed the claim stating that the generally speculative nature of the proof was insufficient to support a finding of compensability. The decision cited the very well established case of *Matter of Riehl* v. *Town of Amherst,* 308 N.Y. 212, 217.

Matter of Riehl v. *Town of Amherst,* 308 N.Y. 212, is a leading case on the evaluation of substantial evidence. One doctor made the statement that there was relationship. The Court in reviewing the record stated that statement of opinion needs to be analyzed against the background of his entire testimony to determine whether that statement rises to the level of substantial evidence. In *Riehl* the Court stated "Expert opinion lacks probative force where the conclusions are 'contingent, speculative, or merely possible' ", (*Matter of Riehl* v. *Town of Amherst,* 308 N.Y. 212, 216.) The Court further discussed

that review of findings of an administrative tribunal in evaluation of the evidence must be viewed in the light of the record as a whole, citing *Matter of McCormack* v. *National City Bank,* 303 N.Y. 5, 9; *Matter of Kopec* v. *Buffalo Brake Beam-Acme Steel & Malleable Iron Works,* 304 N.Y. 65, 71. The Court in *Riehl* further went on to state that "Evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony. (*Matter of Stork Restaurant* v. *Boland,* 282 N.Y. 256, 274)". The Court thereupon reversed the claim for relationship between the compensable head injury and death from cancer that followed ten years later.

In *Riehl* the Court also cited *Matter of Bye* v. *State Insurance Fund,* 279 App. Div. 1105. In the *Bye* case the Board found that strain of lifting a seventy five pound locker could have caused pleural bleeding and aggravated cancer of the lung. In reviewing the evidence the Court stated that there was some opinion evidence that due to the existence of the carcinoma the lifting of a metal locker in the month prior to deceased's death could have caused bleeding in the pleural cavity which would have had some relationship to death. The Court then further stated that the same physician "also testified that the carcinoma was such that bleeding could occur with no exertion at all."

The medical examiner described that the involvement of the lung showed the most severe spread that he had ever seen. The Court then ruled that in the light of the record as a whole they did not regard as substantial evidence equivocal medical opinion on which the award was based. They reversed the Board's ruling of compensability and dismissed the claim.

As will be hereafter shown, in the instant case the physician who testified in an attempt to support relationship had stated that following the trauma liquid was re-

leased into the oral cavity and there was no other evidence of any opening in the gum (101a). The doctor admitted that with the pathology that was going on in the deceased's mouth for many years, that could lead to exactly the sort of opening that was noted if the pathology itself advanced far enough (103a, 104a). This admission is similar to that which the Court said had neutralized the opinion of the physician in the *Bye* case.

Additionally in the instant case, as will hereafter be discussed, there is positive evidence that the finding of the small opening in the gum with exudate through such opening is typical in an ameloblastoma of the jaw (189a, 190a).

In Item 14 of the ALJ Decision appealed from (11a) it is stated that the medical opinions are conflicting. The decision then quotes a statement by Dr. Albanese that "the trauma in his opinion definitely aggravated and stimulated the tumor" whereas Dr. Robinson testified to the contrary.

The record must be examined as a whole to see if the statement of Dr. Albanese is supported by analysis or factual relationship to the evidence that would make this statement anything more than a categorical statement without support and therefore not substantial evidence.

A specific review of the record in this case we submit establishes that the statement is merely a categorical one, is not supported by sufficiently cogent analysis to rise to the level of substantial evidence.

All the testimony is this claim was taken at the formal hearing of October 5, 1973 before the Administrative Law Judge. The Judge after reserving decision by memorandum and order dated April 5, 1974 held that he could not with absolute certainty find that aggravation of the pre-existing cancer had occurred but that he did find that

the accident of October 2, 1972 "most probably, aggravated his pre-existing ameloblastoma condition". (Item 16 ALJ Decision April 5, 1974) (12a).

Awards thereafter were made for facial disfigurement and 57 days claimed lost time based on that finding. If the claim is to be compensable the claim for facial disfigurement and for the 57 days lost time would be proper.

The question presented is whether the record contains substantial evidence to support the judge's finding of aggravation.

The judge correctly found that the accident occurred on October 2, 1972 when struck on the left side of his face and shoulder by a falling carton of bananas (Item 2 ALJ Decision April 5, 1974) (7a). He incorrectly found in Item 3 of that decision (7a) that claimant felt pain in his jaw and continued to work and noted yellowish pinkish mucous in his mouth. Claimant did not feel any pain on the left side of his face at the time of the accident or as he continued to work, and this is contrary to the judge's finding (31a). Claimant felt his whole jaw paining when he went to bite on a ham and cheese sandwich at lunchtime two hours later (32a).

The decision further found that prior to the accident claimant had been unaware of the tumor and experienced no symptoms (Item 8 ALJ Decision 4/5/74) (8a). In this same item he found that the malignant tumor had been developing in the claimant's mouth for between twenty and forty years.

The operating dental surgeon Dr. Albanese testified in support of the claim. Dr. Albanese's pathological consultant who actually made the diagnosis, Dr. Harry Robinson, Dr. Tagliagambe who examined the claimant the day after the accident, and Dr. Sage, carrier's consultant who examined the claimant on November 7, 1972 before the major surgical procedure, all testified against the theory of aggravation.

We submit that an examination of the record as a whole establishes that the statements made by Dr. Albanese do not rise to the level of substantial evidence so as to support a conclusion of aggravation.

On direct examination Dr. Albanese stated that he believed the accident did aggravate the ameloblastoma and may very well have stimulated it (78a, 79a). He said that it did produce an opening in the mouth which claimant did not obviously have prior to that episode (79a).

The question presented for review is whether this constitutes substantial evidence in support of a finding of aggravation when the record is considered as a whole. We contend it does not and that the record as a whole including the entirety of Dr. Albanese's testimony does not rise to the level of substantial evidence and that this Court should reverse the finding of aggravation.

All of the physicians who testified in this case have described that the ameloblastoma was in existence for many years prior to October 2, 1972. Dr. Albanese agreed that the x-rays taken the day after the accident showed that almost the entire jaw was destroyed with only a small portion of bone intact along the lower portion of the mandible and actually perforating the upper border of the mandible (74a, 75a).

Dr. Albanese was asked what would have happened if no operation had been performed and he answered that it would have progressed (75a). Dr. Albanese reluctantly admitted that this was a malignant tumor before October 1, 1972 and that of and by itself it had caused practically the entire destruction of the claimant's lower jaw before that date (77a).

He testified that the usual treatment for ameloblastoma was complete surgical excision (81a). He admitted on cross examination that he did not know whether the trau-

ma affected the rate of growth of the tumor (82). He admitted that the serious fluid which was noticed by claimant immediately after the occurrence of the accident took time to accumulate but said it wasn't released from the cavity until the time of trauma (84a, 85a).

Dr. Albanese speculated that the trauma stimulated the cells of the tumor but then admitted that there was no evidence that it did so (100a). He specifically admitted that the pathological report showed no evidence of any active rapidly multiplying cells (100a).

Claimant's testimony reveals that the blow to the face was of such minor nature that when claimant was examined by Dr. Tagliagambe the day after the episode there was no evidence of laceration, contusion, cuts or bleeding within the mouth, that the only finding then was an opening about the size of a pin head over the point of where subsequently the tumor was found to be located (132a). Although the x-rays were completely negative for any fracture Dr. Albanese attempted to state that the episode had caused a fracture and cracking of the bone (103a) and there is no evidence to sustain this observation by the doctor at all.

Dr. Albanese admitted that the pathology which had by October 1, destroyed practically the entire mandible could without any trauma have expressed itself in the minute opening seen through the gum seen immediately after the episode (103a, 104a).

Dr. Albanese then reversed himself and admitted that there was no fracture of the jaw (105a). Although Dr. Albanese had admitted that practically the entire bone was gone by virtue of the advanced stage of the cancer he attempted to deny that even slight trauma would cause serous exudate to occur (113a). Yet he admitted that there was no laceration on the inside of claimant's cheek

on the left side (113a). Finally Dr. Albanese admitted that he was speculating that the tumor was stimulated (98a).

We submit that an examination of Dr. Albanese's testimony as a whole reveals that he scheduled the operation of November 15, "to avoid the possibility of recurrence of the tumor" (87a, 88a).

However, this doctor never removed any portion of the tumor itself in the minor procedure performed in his office on October 5, all he did was to remove soft tissue lining of the bony cavity (56a).

In order to remove the tumor itself he had to take out six centimeters, approximately three inches, of the deseased mandible. Of the six centimeters two consisted of the tumor and the additional two centimeters on each side were taken out as a precautionary measure (64a). He did not remove the tumor on October 5, and therefore after the October 5, procedure the tumor was still in the mandible. When he scheduled the operation for November 15, it was to remove the tumor. Thus the operation on November 15, was not done to prevent a "recurrence" because he had never taken out the tumor to start with. Thus his assertion that he did the surgical procedure on November 15 to prevent a "recurrence" is specious on its face and lacks substance entirely.

Dr. Robinson, the pathologist selected by Dr. Albanese, testified that the treatment of an meloblastoma is complete surgical excision and that the entire tumor had to be removed with a margin of adjacent apparently normal tissue (151a).

Dr. Robinson testified that Dr. Albanese told him that there was no evidence of fracture of the previously diseased bone (152a). Dr. Robinson further testified that there was no indication that the trauma accelerated the

tumor. He stated that he felt that it was fortunate that the episode occurred because this drew claimant's attention to the fact that he needed medical care and he received the necessary surgical intervention which might otherwise have gone unnoticed until the problem would have been even more difficult to eradicate surgically (152a, 153a).

He further pointed out that tumors of this sort have been known to cause death of patients (168a).

He further testified that Dr. Albanese described that the only thing separating the top of the tumor from the gum was oral membrane, no bone at all (168a). Dr. Robinson concluded that there was no indication that the accident caused the tumor to become worse (162a).

Dr. Sage testified that he examined the claimant on November 7, 1972 and the x-ray evidence showed by that date there was no residual bone left in the mandible on its upper area purely as a result of the pre-existing cancer (172a, 173a).

He further testified that there was no finding that the tumor itself grew larger as a result of the accident (161). He also testified that the finding of a small opening with a little material exudating through it was a typical finding on such a tumor (189a, 190a).

He stated that the x-rays taken immediately after the accident showed only mucous membrane separating the tumerous area from the inside of the mouth (184a, 185a). He further testified that even if the trauma broke the mucous membrane it would have nothing to do with the hematoma or affect the bone itself where the tumor was located (186a, 187a).

On all of the foregoing therefore it is quite clear that there was no trauma to the tumor itself, that even if the

accident caused some serous fluid to appear through a small opening this did not affect the cancer itself.

Dr. Albanese had admitted after a lengthy cross examination that his assertion of aggravation or acceleration was pure speculation and does not rise to the level of substantial evidence. The overwhelming weight of the testimony in the record establishes that there was no evidence that there was aggravation of the tumor itself. The operation was performed to remove the tumor and not because there was exudate coming from the gum. The only finding that could possibly have resulted from the accident was the expression of exudate at the pinpoint opening in the gum. There is no indication that the tumor itself was in any way affected by the trauma.

The ALJ decision in Item 15 (11a) states that medical science is uncertain as to what causes or aggravates a malignant growth.

The testimony of Dr. Robinson, the pathologist, Dr. Sage, the specialist in cancer surgery, and of Dr. Tagliagambe indicates that although no one knows what causes the tumor, nevertheless where there is aggravation, if in fact aggravation occurs, it can be manifested in x-rays or by the finding of fresh cancer cells and such findings are completely absent in the present case.

Also in the present case the record establishes even by the testimony of Dr. Albanese that the type of cancer which was found in this case is a very slow growing type of cancer unlike the virulently fast growing cancers which have been found to sustain rulings of compensability on the basis of aggravation as cited above.

The decisions below state that Workmen's Compensation Statutes are humanitarian Acts and should be construed liberally citing *Pillsbury* v. *United Engineering Co.,* 72 S. Ct. 223, 342 U.S. 197 (11a, 17a). Reference to

the *Pillsbury* case shows that the Court although characterizing the Workmen's Compensation Statute as a humanitarian Act nevertheless specifically found that such did not justify an application of "humanitarianism" to do away with legal requirements.

In the *Pillsbury* case the question was whether the deputy commissioner's ruling that a claim, filed within one year of date of disablement but more than one year after date of injury, nevertheless was timely. The Court stated that the law specified that filing must be within one year of date of injury not one year of date of disability and they would not under the guise of humanitarianism twist the plain meaning of the law or requirement thereof to effect compensability. The Court stated "We are aware that this is a humanitarian Act nd that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and makes what was intended to be a limitation no limitation at all" *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200).

Similarly in the instant case the fact that the Longshoremen's and Harbor Workers' Compensation Act is a humanitarian law does not do away with the specific requirement that there must be substantial evidence to support a finding.

A decision which is not based on the evidence but instead on a finding that a ruling is made on behalf of the claimant because the Act is to be construed liberally, is an improper decision and must be reversed (*Georgia Power Co.* v. *Carter,* 138 S.E. 2d 182) The ALJ decision herein appealed from specifically noted that it could not find with absolute certainty that aggravation occurred (Item 16 ALJ Decision April 5, 1974) (12a). The Administrative Law Judge then went on to say that the injury, most probably aggravated the pre-existing ameloblastoma condition (12a).

Petitioner submits however, that this record does not support, by any evidence that can be considered substantial within the requirements of the law, a conclusion either that the pre-existing cancer of the mandible was aggravated or even most probably aggravated. To the contrary we submit that the substantial evidence establishes that there is no causative relationship and that the record does not contain any substantial evidence to support the finding of aggravation.

For all of the foregoing therefore we contend that the finding of aggravation must be reversed and the claim dismissed.

POINT II

Even if it is assumed, arguendo, that this claim is compensable an award cannot be made against the employer and carrier for attorneys fees.

Awards for attorneys fees against an employer and carrier and also fees to witnesses have been established as liability against the employer under amendments to the Longshoremen's and Harbor Workers' Compensation Act effective November 26, 1972. Prior to that date there was no such obligation to be assessed against the employer. Since the accident of the present claim occurred on October 2, 1972, prior to the effective date of the amendment in respect of attorneys fees, even if this claim is compensable, no award should have been made against the employer and carrier. The Workmen's Compensation Law in effect at the time of the injury governs the rights of the prospective parties (*Ellis* v. *Kroger Grocery and Baking Co.*, 152 P. 2d 860; *Pearsall* v. *Great Northern Railway*, 161 U.S. 646).

CONCLUSION

For all the foregoing, appellants ask that all portions of the decision of the Administrative Law Judge and his order wherein responsibility of the employer for aggravation of the pre-existing cancer is established and award made for compensation based thereon, as affirmed by the Benefits Review Board, be reversed and this claim closed on payments already made by appellants for the period from October 2, 1972 through October 15, 1972 at $70.00 rate which represents the sole period of disability to be attributed to the accident of October 2, 1972.

In the alternative, arguendo, if this Court affirms the basic rulings of compensability that appellants cannot be held responsible for payment of $800.00 fee to claimant's attorney herein and that in any event that portion of the awards and decisions below should be reversed.

Respectfully submitted,

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LEONARD J. LINDEN
Of Counsel

United States Court of Appeals
for the Second Circuit

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

In The Matter of the
Claim for Compensation under the Lonshoremen's and Harbor Workers Compensation Act made by Edward Potenza

Claimant-Appellee

against

United Terminals Inc., Employer-Appellant
and Federal Insurance Company, Carrier-Appellant

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is agent for Linden & Gallagher Esqs. the attorney for the above named Appellant herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 10th day of April , 1975, he served the within

Brief and Appendix

upon the attorneys for the parties and at the addresses as specified below

1. Edward Polenza
Attorney for Claimant-Appellee
238 Harrison Street
Leona, New Jersey

2. William J. Kilberg Esq.
Solicitor of Labor
Attorney for Director
Office of Workmen's Compensation Programs
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3. Leon Blaufarb Esq.
Kalmanson, Klapper, & Blaufarb Esqs.
Appellees Previous Attorneys below
225 Broadway
New York, New York

by depositing 2 copies of Brief and two copies of Appendix to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 10th.
day of April, 19 75

Raymond J. Braddick

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977